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Surgeon's evidence is to the contrary effect), nor that the clothes, either of the complainant or the prisoner, showed any stains which would indicate to what point the prisoner's criminality had proceeded. In saying this it is not necessary that we should impute dishonesty or intentional exaggeration to the complainant. The unsatisfactory nature of the evidence on this point may perhaps be attributed to ignorance, arising from youth or innocence; for she is stated never to have had sexual intercourse, and she may therefore, possibly, be unable to describe, with any intelligence or accuracy, the nature and extent of acts directed to that purpose.

For these reasons we find the prisoner Shankar Gyanu not guilty of attempt to commit rape, but guilty of using criminal force to a woman intending to outrage her modesty—an offence punishable under s. 354 of the Indian Penal Code: and as we consider the assault to have been one of an aggravated character, we sentence the said Shankar Gyanu to rigorous imprisonment for two years.

Order accordingly.

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5 B. 405=6 Ind. Jur. 37.

APPELLATE CRIMINAL.

Before Mr. Justice Pinhey and Mr. Justice Nanabhai Haridas.

THE GOVERNMENT OF BOMBAY *v.* SHIDAPA.* [13th April, 1881.]

The Code of Criminal Procedure, s. 147—Dismissal of complaint—Revival of complaint.

A person made a complaint to the police that the accused had enticed away his wife (a non-cognizable offence), and committed theft (a cognizable offence). The police inquired into the latter offence only; and finding no *prima facie* case made out, reported to that effect to a Magistrate, who directed that that offence be expunged from the list of reported offences.

Held that under the circumstances, there had been no dismissal of the complaint in respect of the former offence; and that there was no bar to the complaint into that offence being taken up and proceeded with.

THIS was an appeal by the Government of Bombay against the order of C. F. H. Shaw, Sessions Judge of Belgaum, reversing the conviction and sentence of one year's rigorous imprisonment [406] recorded by R. B. Balkrishna Devrav, Magistrate (First Class) against the accused, charged with enticing away a married woman, under s. 498 of the Indian Penal Code.

The facts of the case fully appear from the judgment of the Court.

Hon. *V. N. Mandlik* (Govt. Pleader), for the Government.

Pandurang Balibhadra, for the accused.

JUDGMENT.

PINHEY, J.—This is an appeal by Government from an order of the Court of Sessions at Belgaum reversing, on appeal, a conviction and sentence recorded by Mr. Balkrishna Devrav, First Class Magistrate in the Belgaum District, against Shidapa Basapa.

Shidapa Basapa was convicted by the First Class Magistrate, under s. 498 of the Indian Penal Code, of enticing away with criminal intent a married woman, an offence triable by a Magistrate of the First or Second Class. The Court of Session reversed the conviction, on the

* Criminal Appeal, No. 18 of 1881.

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ground that the First Class Magistrate had no jurisdiction to try the case, as the complaint against the accused had been already dismissed by a Second Class Magistrate under s. 147 of the Criminal Procedure Code and the First Class Magistrate was not authorized to re-hear the complaint, and try the case, under s. 298 of the Code of Criminal Procedure.

We are of opinion that the Court of Session was in error in disposing of the appeal of Shidapa Basapa, and reversing the conviction and sentence recorded against him by the First Class Magistrate, for the following reasons.

We are of opinion that the complaint, against the accused, of an offence punishable under s. 498 of the Indian Penal Code, was never dismissed by the Second Class Magistrate under s. 147 of the Criminal Procedure Code. Under that section, a Magistrate, before whom a complaint is duly made, may, if, after examining the complainant, there is in his judgment no sufficient ground for proceeding, dismiss the complaint. No complaint of an offence under s. 498 of the Indian Penal Code was ever duly made before the Second Class Magistrate, nor was any [407] examination of the complainant in respect of such an offence held by the Second Class Magistrate. There could, therefore, have been no dismissal of the complaint by the Second Class Magistrate.

What happened before the case came before the First Class Magistrate was this: the complainant made a complaint to the Superintendent of Police, alleging that accused had enticed away the complainant's wife, and taken away some ornaments. The enticing away the woman was a 'non-cognizable' offence; but the alleged stealing the ornaments, was one of which the Superintendent of Police could take cognizance. The Superintendent of Police sent the complaint to a subordinate policeman (a chief constable) for inquiry. The chief constable scarcely noticed the allegation as to the enticing away of the woman, but inquired into the alleged offence of theft under s. 379 of the Indian Penal Code, and considering that no such offence was even *prima facie* made out, he so reported to the Third Class Magistrate at Chikodi, under s. 117 of the Code of Criminal Procedure. The report came before the Second Class Magistrate at Chikodi, who, concurring with the chief constable, directed him to strike off the offence complained of from the list of reported offences. It is clear that the chief constable could not legally, and did not, inquire into the alleged enticing away of the complainant's wife, mentioned in the petition. The chief constable could not, under s. 110 of the Code of Criminal Procedure, have investigated such an offence without an order from the Second Class Magistrate. There was then, for the reasons above given, no dismissal, under s. 147 of the Code of Criminal Procedure, of the complaint of an offence punishable under s. 498 of the Indian Penal Code to bar the proceedings taken by the First Class Magistrate, which resulted in the conviction of the accused Shidapa Basapa. In the judgment of the Court of Session the case of *Imperatrix* v. *Gowdapa bin Venkangavda* (1) is cited as governing the present case, but it does not do so. In that case it was held that, "when an accused person has been discharged by a Subordinate Magistrate under s. 215 of the Code of Criminal Procedure, and the Magistrate of the district, after calling for the proceedings, considers that the order of discharge was improper, the proper course for the [408] Magistrate of the district to adopt is to refer the proceedings for the

(1) 2 B. 534.

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orders of the High Court, and not to order a new trial by another subordinate Magistrate." Whereas, in the present case, the evidence of the complainant and his witnesses was not taken, and the accused was not examined by the Second Class Magistrate, and, therefore, the accused could not have been discharged under s. 215.

The order made by the Court of Session on appeal in this case must be reversed, and the appeal remitted to the Court of Session for disposal on its merits.

We notice that in the judgment of the First Class Magistrate he appears to consider that the facts proved would maintain a charge of adultery, an offence cognizable by the Court of Session only.

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5 B. 408 (P.C.)=8 I.A. 77=5 Ind. Jur. 380=4 Sar. P.C.J. 230.

PRIVY COUNCIL.

PRESENT:

Sir B. Peacock, Sir M. E. Smith, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court of Bombay.*]

MAHARAVAL MOHANSINGHJI JEYSINGHJI (*Plaintiff*) *v.* THE GOVERNMENT OF BOMBAY (*Defendant*). [8th March, 1881.]

Toda-giras hak—The Pensions' Act XXIII of 1871.

In part of Western India annual payments, known as *toda-giras hak*, made by village communities and commuted by them into liabilities to *girasias*, have been recognized as a species of property, however unlawful their origin.

In 1862 a resolution of the Government of Bombay described the position of the *girasias* at that time, and gave them the option of resuming the collection of the *toda-giras hak* formerly levied, resorting only to legal proceedings to enforce their claims, or of receiving, from the Government, allowances of an equivalent amount; the collections, in the latter case, being discontinued on all hands. The ancestors of the adoptive father of the plaintiff formerly levied *toda-giras hak*; and after 1862 the Government in respect thereof made payments under the resolution, to three brothers, of whom one was the plaintiff's father; the latter receiving a one-third share; which, on his death in 1865, was no longer paid.

Held that a suit against the Government for payment of this third share with arrears fell under the Pensions' Act XXIII of 1871, s. 4, which prohibits cognizance, save as in the Act provided, "of any suit relating to any pension or grant of money or land revenue conferred or made by the British, or any former government, whatever may have been the consideration [409] for such pension or grant, or whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted."

Held that there was no reason, either in the language of the Act itself or in any antecedent legislation, for construing these words as applicable only to rights in the nature of pensions.

[R., 17 A. 1=4 M.L.J. 272=21 I.A. 148=6 Sar. P.C.J. 489; 4 B. 432; 16 B. 537; 22 B. 496 (499); 29 B. 480=7 Bom. L.R. 497; 4 M. 341 (343); 31 M. 12=17 M. L.J. 549=3 M.L.T. 104.]

APPEAL from a decree of the High Court of Bombay (10th October, 1877), affirming that of the District Judge of Surat (1st December, 1876).

The question raised on this appeal was whether the Civil Courts were prohibited by the Pensions' Act, 1871 from taking cognizance of the suit, without having first received from the Collector of the district the certificate required for the institution of claims falling under that Act.